



United States Department of the Interior

FISH AND WILDLIFE SERVICE

300 Westgate Center Drive
Hadley, MA 01035-9589



In Reply Refer To:
FWS/Region5/ES

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Memorandum

To: Rules Processing Team, Minerals Management Service, Herndon, Virginia

From: Regional Director, Region 5

Subject: Alternative Energy Related Uses on the Outer Continental Shelf -1010-AD30

This is in reference to the Advance Notice of Proposed Rulemaking (ANOPR) for Alternate Energy-Related Uses on the Outer Continental Shelf Regulation Identification Number 1010-AD30), which was published by the Minerals Management Service (MMS) on December 30, 2005, in the Federal Register (FR) (70 FR 77345). In that FR notice, MMS requested comments, which we are providing herein.

While we initially attempted to follow the outline and sequence of generic and specific questions MMS posed in the FR notice, we deviated from your format due in part to our recent experience with off-shore wind energy projects such as have been proposed by Cape Wind, Winergy, and the Long Island Power Authority. This recent experience and our long-standing involvement in other energy programs inform the comments we make herein and our suggestions for the following conceptual framework for the rule. Because our comments cover issues outside of the program areas identified in the FR notice, as requested in the ANOPR, we are identifying them as being in the "other" category.

Conceptual framework for access and approval for alternate energy-related development on the Outer Continental Shelf (OCS)

Informal access – We recommend that MMS adopt a flexible approach to the issue of access to the OCS for the purpose of collecting information to assess resources and site suitability for alternate energy-related uses. Some potential applicants may not need or want a lease or other formal (legal) access to conduct resource studies and evaluations on the OCS. Consequently, access during at least some portion of their investigations into potential energy development may not be an issue for them. However, we expect the MMS and other agencies to have a keen interest in what kind of information a potential applicant is collecting, how it is being collected, and for how long. This issue can be and should be addressed for this subgroup of applicants in

the documentation required for a notice of intent to file an application for development on the OCS.

Preliminary Lease – For applicants that need or desire formal access to the OCS for collecting data on resources and site conditions, a short-term authorization may be appropriate. For this subgroup, a legal mechanism such as a preliminary permit or lease could be used to promote the purposes of the Energy Policy Act of 2005 (Section 388 - Alternate Energy-Related Uses on the Outer Continental Shelf). The purpose of the preliminary permit would be to grant a short-term lease for the purpose of collecting resource information. Other parties would be prohibited from filing a Notice of Intent (NOI), or application to develop that tract/area during the life of the permit. The preliminary permit should be subject to FR notice procedures, non-exclusive, effective for a period of 3 to 5 years, cover a specific tract or area, and should be open to all forms of alternate energy-related activities potentially viable for that tract. As in the case above for informal access, the data collected by the holder of a preliminary permit could be proprietary for a limited time. At the expiration of the preliminary permit, or at the time a NOI/application is filed, all information collected on the OCS tract should become public. The expense for collecting all information necessary to meet the information standards for the NOI and application phase shall be borne by the applicant.

Notice of Intent – The purpose of the NOI would be to notify the public, agencies, and potential competitors that an applicant intends to file an application to develop certain alternate energy-related developments on a specific OCS tract within a fixed time period, e.g., 12 to 18 months. The NOI would be a mandatory precursor before an applicant could file an application. The NOI stage could formally start the scoping process for the application, as well as National Environmental Policy Act (NEPA), and other Federal/State/local regulatory processes associated with development on that tract. This would be a key event setting in motion interagency coordination and consultation regarding the alternate energy-related use. Information standards would need to be established, but at a minimum, the NOI should identify the applicant, the specific nature of the proposed development, the specific area or tract on the OCS, an overview of the studies the applicant has and/or is conducting, State lands and waters that may be affected, and future studies the applicant proposes to conduct.

Application Stage – The purpose of the application would be to establish the processing framework and to control thresholds for information needed in the regulatory process. To the extent possible, the rules for this stage should provide sufficient detail to describe the generic level of information needed to adequately evaluate a proposal. This would be supplemented by the scope of study prepared as a result of information developed during the NOI process. Applications would not be accepted as complete until these identifiable standards are met. The NEPA process, exclusive of scoping, would not be started by MMS or a third party contractor until an application is accepted as complete. These processing steps are important because they form incentives for potential applicants to plan, budget, and collect essential information, and plan and budget the necessary time, funds, expertise, and management needed for a complex administrative review process.

With respect to the scope of issues and studies for alternate energy-related developments, we would expect them to be at least partly prescriptive for energy developments that have been subject to the NEPA process, e.g., wind farms. Other generation types representing new technology such as wave or current projects may need an iterative scoping process to properly identify and frame environmental issues and devise necessary studies and study protocols to address these questions before minimum prescriptive standards could be developed.

The application stage would be an appropriate time to invite competition and provide public notice of the proposed activity and review process. Consideration should be given to the possible role that competing applications could serve as alternatives in the NEPA process.

Information Standards for Wind Projects

Avian – Three years of radar monitoring shall be provided using X- and S-band radars operating simultaneously in a 24/7 mode from a jack-up barge or other stable platform in the tract where the wind project is proposed. Verification studies to groundtruth radar data shall be required and must include at least two techniques such as visual observation and listening for bird sounds, infrared imagery, acoustic recording, or observation using high-end night vision equipment. An applicant could substitute a new technology for one of the required verification studies with approval from MMS. All raw radar data shall be stored on hard drive/disk for off-site processing by the applicant and an independent firm selected by MMS for quality control purposes. This could be the third party contractor preparing the NEPA document. Any proprietary software or other methods used in target detection, tracking, sorting and other processing steps would need to be supplied by the applicant as part of the quality control procedure.

Aerial surveys shall be conducted monthly for a period of 3 years on transects not greater than 7,500 feet apart covering the entire wind project site and an adjacent area an additional 4 nautical miles outside the project boundary. More frequent surveys shall be required for selected activities such as migration, staging, wintering, and certain reproduction and juvenile activities.

Boat surveys shall be conducted monthly during spring, summer, and fall seasons, and if conditions are suitable during the winter season for 1 year. During the remaining 2 years of avian study, boat surveys shall be conducted once per season for the purpose of making visual observations on avian activity and behavior, including predator-prey interactions. Transects for boat surveys may be variable and informed by information collected during aerial surveys.

A predator-prey investigation shall be conducted for the purpose of identifying the predominant benthic and pelagic species on which the avian species found on the tract are feeding. This investigation shall be conducted during all seasons and particularly when concentrations of birds occur in selected areas during specific temporal periods. This study element shall be coordinated with fishery and benthic studies and in some cases with marine mammal investigations because the prey base may be common to one or more predator groups.

Physical Oceanography – Investigations shall be conducted at a scale and frequency sufficient to describe wave, current, temperature, landform, and upwelling conditions at macro- and micro-scales on the OCS tract.

Sediment Conditions – Sediment sampling shall be conducted on a scale that accurately identifies macro-sediment types and microtypes within these macrotypes on the OCS tract. The sampling program shall identify the shape, interspersions, persistence, size and number of microtypes within each of the macro-sediment types present on the tract. Sediment cores shall be collected for each of the micro- and macro-sediment types encountered on the OCS tract for grain size analysis.

Benthic Resources – Sampling for benthic resources shall be conducted on a scale sufficient to identify the spatial and temporal distribution of macrobenthos within macro-habitat types and micro-habitats within these macrotypes on the tract. Sampling shall be conducted over a 3-year period and shall identify the season-to-season and year-to-year variability of the community structure, species composition, abundance, diversity, and utilization of key species by higher level predatory species. Sampling shall also identify the numbers, size, shape, interspersions, and persistence of micro-habitats within macro-scale habitats. Recreational and commercial utilization of benthic resources, e.g., shellfish, shall be identified by species, location, season, and gear used during the 3-year study period and from existing historical records.

Fisheries – The applicant shall identify the spatial and temporal distribution of fish within the OCS tract. An appropriate array of sampling gear and methods shall be used to identify fish distribution at macro- and micro-habitat scales to include year-to-year and season-to-season changes in species and life stage composition and abundance for demersal and pelagic species. Recreational and commercial fisheries shall be identified during the 3-year period by species, location, season, and gear used, and from historical records. The predator-prey investigation involving birds, fish, and benthic invertebrates should be coordinated with this study element.

Sea Turtles – Documentation shall be provided on the spatial and temporal distribution of sea turtles within the OCS tract. Specific investigations shall be utilized or may be coordinated with other studies and from historical records.

Marine Mammals – The spatial and temporal distribution of marine mammals shall be identified within the OCS tract.

Threatened and Endangered Species – Within the species groups above, listed species shall be given a specific evaluation. The scope of these studies shall be coordinated with MMS, and the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service, as appropriate.

Bats – The applicant shall determine if bats migrate across the OCS tract during spring and fall migration seasons. This study element should be coordinated with the avian studies. Specific investigations for bats should be coordinated with MMS and FWS.

Current and wave energy projects – Construct a series of information standards for each and further develop during the scoping process. The information standards presented above could serve as a template and be modified to place greater emphasis on benthic and pelagic species and less emphasis on avian species.

Specific information requested or questions posed in FR Notice

1. Should areas of the OCS be included or excluded from the program

We believe this could be addressed in at least two different ways. First, the MMS could formally ask the coastal States for their views on this matter for all or specific alternate energy-related uses. Second, MMS could undertake a broad-based zoning review of the areas of the OCS most likely to be of interest to potential alternate energy-related uses and determine which areas are environmentally suitable and which are not. We encourage the MMS to undertake such a broad-based review of the OCS for the purpose of, at least initially, including suitable areas and excluding unsuitable areas.

As part of this broad-based review, we encourage the MMS to undertake initial regional assessments of the OCS to identify and filter out important bird areas and migratory paths. The OCS assessments should include the temporal and spatial distribution, abundance, and migratory pathways of a plethora of resources. Areas with high resource functions and values should be withheld. At the same time, research on the ecosystem linkages and biology of the resources should be conducted. We encourage the MMS to complete a regional assessment prior to opening an area for consideration. We are available to cooperate with the MMS on an assessment in the northeast region to the extent workload and staffing will allow. A fund should be established to conduct a broad-based review and research needed to determine the areas with high resource values.

For the Atlantic Coast, based on water bird distribution and geography, we recommend that the minimum sized units for regional assessment be from Maine to Cape Cod, Cape Cod to New York City, New Jersey to Virginia, and North Carolina to Georgia. Due to a variety of factors, notably transmission and other technology constraints, the initial or phase I OCS study area would likely be a strip of land extending approximately 25-30 miles offshore and running parallel with the coastline. Areas of the OCS beyond this 25-30-mile distance offshore are likely beyond the range of cost-effective AC transmission technology or contain water depths too deep for existing wind tower foundation technology or both.

2. Information pertaining to environmental management system

The FR notice discusses monitoring programs, methods of validation and verification, and mitigation in the context of an adaptive management strategy. We believe a proposal to develop an adaptive management strategy for offshore wind projects, and perhaps for wave and current energy technology, is premature and has at least two fatal flaws. First, adaptive management cannot be effective in an environment where off-the-shelf technology and practical means do not exist to monitor project effects. Bird and bat collision impacts in offshore environments are a

case in point because they cannot be effectively monitored. The vast majority of dead or injured birds or bats would simply disappear in the water and go unnoticed. Monitoring for some habitat fragmentation effects using radar or visual observation may be compromised due to the shadow effects caused by the turbine array. New technology for effective monitoring will need to move from research and development into an off-the-shelf implementation phase before any scientific assessment of the monitoring technology in a commercial scale offshore setting can be conducted.

Second, adaptive management is often used as a euphemism for a build-it-first and study-it-later approach. This strategy compromises the underlying tenants of environmental review. Particularly with an emerging technology, informed decisions based on sound science and a robust administrative record are needed to set good precedent. Some alternate energy-related proposals on the OCS are certain to be controversial. A set of rules that is interpreted as allowing a build-then-study approach is likely to be viewed as problematic. We think the rule should stress an extensive pre-application study program to provide the information necessary to support a complete application, the NEPA process, the leasing decision, and to build public confidence. These standards would serve as a disincentive for speculative developments such as we have seen in the recent past, while setting forth a clear regulatory pathway for well considered projects.

We urge the MMS to eliminate any reference to an adaptive management strategy in the siting and leasing portions of the rules for deciding alternate energy-related activities on the OCS. Instead, we encourage the MMS to develop a program that requires an applicant to complete a multi-staged consultation process, including extensive studies, in cooperation with resource agencies and other parties, prior to filing its application with the MMS. The rule should reserve opportunity for the MMS to make "additional information requests", after an application has been filed, for applicants to provide information not in their application that a consulting agency has requested or MMS requires. This process should be iterative and conclude when the record is sufficient to support reasoned and informed decisions. While the currency of a regulatory program is information, we recognize that decisions will be made in the absence of complete knowledge. Since information or circumstances may change during the project term, the program should provide the flexibility necessary for the MMS to address change, if warranted. Any changes in a project's authorizing conditions should be subject to consultation and comment by the resource agencies.

Since the MMS will decide whether or not, and under what conditions, to authorize alternative energy projects on the OCS, we encourage it to specifically reserve its authority to modify the conditions of authorization during the life of the project, if warranted due to new information. This is a lawful and accepted practice in other regulatory programs; e.g., the hydroelectric licensing program of the Federal Energy Regulatory Commission. Informing owners (and their financiers) about possible changes during the project term provides the predictability and certainty that they expect when deciding whether or not to commit to the project as conditioned. We think reserving authority to adjust an authorizing condition of a project, based on new information, is prudent and not a euphemism for a build-it-first and study-it-later approach.

We believe monitoring programs are a necessary and an important element in the rulemaking process. One way to address this issue is to identify monitoring as a requirement for a complete application in the rule and provide a broad framework listing generic requirements for the monitoring plan. These requirements could be in the form of a 3-to-5-year time period post-construction, a need to utilize the same or similar methods used during pre-construction studies for the various species groups or study elements, and a consultation process with MMS and interested parties to scope the details of the various elements of the overall plan.

We do not believe the rule can be or should be overly prescriptive regarding the details of specific elements of a monitoring plan, given the emerging nature of alternate energy-related developments on the OCS.

3. Coordination

We are encouraged that MMS has placed such a prominent role on consultation and coordination with other agencies and parties in the ANOPR. We agree that the rulemaking should devote considerable effort to making coordination and consultation opportunities an integral process in the rules themselves. In order for coordination and consultation to be effective, it must be a two-way process in which both parties participate and identify some useful result. Our recent experience with offshore wind proposals reveals that we have had a great deal of coordination, but little in the way of useful results on some important issues, e.g., avian radar studies. The rule should be structured in such a way as to make consultation/coordination efficient. The process needs to be structured to be efficient; if not, it is all the more likely that coordination will be inefficient, ineffective, and contentious. Our level of interest and participation in alternate energy-related developments on the OCS will depend on factors identified above, but also on the potential for impacts to fish and wildlife resources. Activities that directly or indirectly affect migratory birds are likely to translate into a higher level of interest and participation than would be the case for an activity that would minimally affect marine habitat. The rule should provide for changing circumstances during the planning, design and approval process because resource impacts may change as plans change. Accordingly, the rule should be structured to make consultation and coordination opportunities readily available throughout the process.

4. What Federal authorities are pertinent

Federal statutes that provide authority for the FWS to consult and coordinate in the MMS process for offshore energy development include: The Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*); the Migratory Bird Treaty Act of 1918 (16 U.S.C. 703-712); the Bald and Golden Eagle Protection Act (16 U.S.C. 668-669d); the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*); the National Wildlife Refuge System Improvement Act (16 U.S.C. 668dd *et seq.*); the Fish and Wildlife Act of 1956, as amended (16 U.S.C. 742a-742j, not including 742d-1); and the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Executive Order 13186 of January 10, 2001: Responsibilities of Federal Agencies to Protect Migratory Birds is also pertinent.

5. How should existing uses be treated

Existing uses on the OCS should be maintained and protected in a hierarchical system similar to the manner in which existing uses are protected under antidegradation provisions in the Clean Water Act, 33 U.S.C. 1313(d)(4), Environmental Protection Agency regulations (40 CFR 131.12), and guidance (Water Quality Standards Handbook).

In order to accomplish this, the regulations will need to establish a process to ensure that the applicant identifies all of the existing uses in, on, and above the OCS tract where the alternate energy-related activity is proposed – including those affected by a moratorium such as oil and gas. Neither the applicant nor MMS could demonstrate that existing uses would be maintained and protected if neither one knows what uses exist, where they exist, and when they exist on the OCS tract. The spatial and temporal distribution of species and their activities, of habitats, and human activities on the OCS tract needs to be understood to address existing uses. Accordingly, the information standards for the NOI and application section of the rule need to specify data collection protocols and/or thresholds to ensure that applicants will have a high probability of detecting resources and activities that qualify as existing uses.

Under this approach, alternate energy-related uses on the OCS would need to avoid existing uses altogether or, at a minimum, be fully compatible with existing uses. We recommend that MMS adopt this as a criterion to consider when deciding whether or not to approve a project.

Thank you for the opportunity to comment on the ANOPR. We look forward to coordination and consultation under the program and working with MMS in the future. If you have any questions or need to discuss our comments, please contact Michael G. Thabault, Assistant Regional Director, Ecological Services, at 413-253-8304, or Alex Hoar of this office. He is available by phone at 413-253-8631, or by electronic mail at Alex_Hoar@fws.gov.



Richard O. Bennett